Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1438

JOHN WALSH,
Petitioner,

v.

HONORABLE H. KENNETH WANGELIN,
United States District Judge,
Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION

and

PETITION FOR WRIT OF PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

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United States District Judge,
Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION

Comes now Petitioner John Walsh and moves the Court for leave to file his Petition for Writ of Prohibition.

Respectfully submitted,

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IN THE

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No. .....

JOHN WALSH,
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v.

HONORABLE H. KENNETH WANGELIN,
United States District Judge,
Respondent.

PETITION FOR WRIT OF PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

Petitioner prays that a Writ of Prohibiton issue to prohibit Respondent from enforcing a Subpoena Duces Tecum served on Petitioner by refusing to quash said Subpoena. Respondent's Order denying Petitioner's Motion to Quash was entered on March 8, 1978.

On March 21, 1978, Petitioner filed a Petition for Writ of Prohibition in the United States Court of Appeals for the Eighth Circuit. This petition was denied on March 23. 1978.

OPINIONS BELOW

The Order of the District Court in denying Petitioner's Motion to Quash Subpoena Duces Tecum was not accompanied by an opinion and is not yet reported. A copy of the Order is attached hereto as Exhibit A. The Order of the Court of Appeals denying Petitioner's Petition for Writ of Prohibition to that Court was not accompanied by an opinion and is not reported. A copy of that Order is attached hereto as Exhibit B.

JURISDICTION

Jurisdiction of this Court is invoked under Section 1651(a), Title 28 United States Code.

QUESTION PRESENTED

1. Did Respondent Judge act illegally and exceed his lawful jurisdiction in refusing to quash the subpoena duces tecum served on Petitioner when said subpoena compels Petitioner to produce personal records and papers before the Grand Jury and thus forces Petitioner to involuntarily waive his privilege against self-incrimination guaranteed to him by the Fifth Amendment to the United States Constitution?

STATEMENT

Petitioner is the sole proprietor of the Virginia Walsh Bonding Company and does business in the County of St. Louis, Missouri, within the Eastern District of Missouri.

Respondent Wangelin is a United States District Court Judge for the Eastern District of Missouri.

On or about February 21, 1978, Petitioner was served with a Subpoena Duces Tecum commanding the custodian of records of the Virginia Walsh Bonding Company to appear before a Federal Grand Jury to testify and to bring with him all the account ledgers, account books, cancelled checks and check stubs of the Virginia Walsh Bonding Company for the years 1975 and 1976 on March 2, 1978. Said subpoena was issued on application of the United States. A copy of the subpoena is attached hereto as Exhibit C.

On or about March 1, 1978, Petitioner filed a Motion to Quash Subpoena Duces Tecum in the United States District Court for the Eastern District of Missouri wherein he alleged that he is the sole proprietor of the Virginia Walsh Bonding Company, that he invoked the Fifth Amendment privilege against self-incrimination as to his testimony and as to his personal records which were subpoenaed, that the subpoenaed records were personal records and thus within the privilege and that compelled production of said records would violate his rights under the Fifth, Fourth and Fourteenth Amendments to the United States Constitution. A copy of the motion and its accompanying memorandum in support thereof are attached hereto as Exhibits D and E respectively.

On or about March 8, 1978, said Motion to Quash was denied by Respondent Wangelin, and Petitioner was ordered to comply with the subpoena on or before March 13, 1978. Said order was issued without allowing oral argument or stating the reasons therefor.

Petitioner believes that he is the subject of a criminal investigation being conducted by the said Grand Jury concerning his conduct in doing business which business is writing bail bonds for persons accused of crimes. Counsel for Petitioner has been informed by the United States Attorney's office that Petitioner is a target of the Grand Jury investigation.

Subsequently, Petitioner was granted a ten-day stay by Respondent or until March 23, 1978, in which to seek either extraordinary relief or appellate relief, said stay to continue until termination of all proceedings in the Appellate Courts. A copy of this Order is attached hereto as Exhibit F. On March 21, 1978, Petitioner filed a Petition for Writ of Prohibition in the United States Court of Appeals for the Eighth Circuit. A copy of this Petition is attached hereto as Exhibit G. This Petition was denied without oral argument or opinion on March 23, 1978.

REASONS FOR GRANTING THE WRIT

This Court Should Prohibit Respondent From Ordering Enforcement of the Government's Subpoena as Such Order Unlawfully Compels Petitioner to Waive His Privilege Against Self-Incrimination or Face Being Held in Contempt of Court and This Petitioner Has No Other Available Relief by Means of Appeal.

Petitioner has been advised that he is the target of a criminal grand jury inquiry regarding the conduct of his business, a bail bond company of which he is the sole proprietor. The subpoena duces tecum, in question seeks all of the records of his business for certain specified years. Petitioner has objected to the compelled production of these records on grounds that they fall within his privilege against self-incrimination guaranteed to him by the Fifth Amendment to the United States Constitution.

Unavailability of Relief Through Other Processes or in Other Courts

A. **Unavailability of relief in other courts.**

The relief sought, prohibiting Respondent from compelling Petitioner to comply with the subpoena, is unavailable to Petitioner from any other court because he has already petitioned the Court of Appeals for the Eighth Circuit for a Writ of Prohibition. That Court has denied the petition without a hearing and without benefit of an opinion Thus, the only Court that can provide the relief sought is this Court.

B. **Unavailability of relief through other appellate processes.**

Petitioner submits that the relief here sought cannot be adequately provided by regular appellate review because of the

constitutionally unacceptable choice which denial of the relief sought leaves him.

Petitioner has two choices if the relief here sought is denied: he can comply with the subpoena and thus waive his privilege against self-incrimination or he can refuse to comply with the subpoena and be held in contempt of court.

Although the case of *United States v. Ryan*, 402 U.S. 530 (1971), appears to hold that if the subpoenaed records are produced, Petitioner could still object to the introduction of the records or their fruits at a subsequent criminal trial, *citing United States v. Blue*, 384 U.S. 251, 255 (1966), Petitioner submits that this is inadequate protection of his privilege. This is so because of the District Court's ruling in denying Petitioner's Motion to Quash the subpoena. It is wholly unrealistic to suppose that such an objection would be sustained at a criminal trial in that one judge in the District has already found that the records are not privileged. Thus, Petitioner might well be saddled with a criminal conviction before he obtained meaningful review of his constitutional claim in the Court of Appeals with the attendant expense and humiliation of being prosecuted.

Even should an objection to the admissibility of the records at a future criminal trial be sustained, Petitioner would still be subject to the humiliation of being indicted and possibly incarcerated before it was finally held that he should not have been compelled to produce the records in the first instance.

Further, even though *Ryan, supra,* indicates that the "fruits" of an illegally produced record would be suppressable at a trial, it is possible and even probable that other evidence gained by the Grand Jury through the records would form the basis for a Grand Jury indictment. Thus the "fruits" of this compelled self-incrimination would be used by the Grand Jury and petitioner would have no knowledge of the use, let alone have

standing to attach its use. *United States v. Blue*, 384 U.S. 251, 255 n. 3 (1966).

Alternatively, Petitioner can refuse to produce the records and stand on his privilege. If this avenue is followed, Petitioner will undoubtedly be held in contempt of court.

Although *United States v. Ryan, supra,* indicates that the only choices open to one who is served with a subpoena are to obey it or defy it and litigate its validity after being cited for contempt, 402 U.S. at p. 532, there are several factors which serve to distinguish the case at bar from the *Ryan* rationale.

Ryan was served with a subpoena to produce records of several corporations he controlled. The records were located in Kenya. Ryan moved to quash the subpoena on grounds that the subpoena was unduly burdensome and because he could not remove the records from Kenya without permission of Kenyan officials. The District Court refused to quash and ordered Ryan to seek permission from Kenya to remove the records and, if permission was denied, to make the records available to United States Government agents in Kenya. Ryan appealed and the Ninth Circuit held that the case was appealable because the District Court's Order was not merely a refusal to quash but was, in reality, a mandatory injunction which was reviewable under Section 1292(a)(1), Title 28 United States Code. The Court of Appeals further held that the subpoena was overly burdensome and ordered it quashed. This Court reversed the Court of Appeals holding that the District Court's order was not a mandatory injunction and thus was not appealable.

Two factors distinguished the case at bar and the *Ryan* case: 1) Petitioner here has elected to proceed by Petition for Writ of Prohibition rather than by direct appeal and 2) Ryan's Motion to Quash was based on the burdensome nature of the subpoena whereas Petitioner's Motion to Quash as well as this Petition is based upon Petitioner's substantial Fifth Amend-

ment claim. (The records sought in *Ryan* were corporate records and thus not within the privilege against self-incrimination: *See, Wilson v. United States,* 221 U.S. 361 (1911).)

Petitioner acknowledges that the denial of a motion to quash a subpoena is not an appealable order, *United States v. Ryan, supra; United States v. Cobbledick,* 309 U.S. 323 (1940). However, prohibition is a remedy wholly separate from appeal. It has as its object preventing a lower court from doing something that it had no judicial power to do. *United States Alkali Export Association v. United States,* 325 U.S. 196 (1945); *De Beers Consolidated Mining Company v. United States,* 325 U.S. 212 (1945). Petitioner submits that Respondent's action in compelling him to comply with an unlawful subpoena, one that compels him to waive his privilege against self-incrimination, is an act outside his lawful jurisdiction and, therefore, is a proper subject for prohibition.

In contrast to the *Ryan* claim, Petitioner here presents a substantial constitutional claim. He should not be forced to put himself in contempt of court thereby exposing himself to fine, imprisonment, and public humiliation and ridicule in order to assert his Constitutional rights.

For these reasons, Petitioner submits that he has no adequate remedy by means of appeal nor is the relief sought available from any other court.

Merits of Petitioner's Claim

A person claiming a Fifth Amendment privilege against self-incrimination as it pertains to documents or papers has a two-fold burden of showing that the privilege is applicable to the documents sought to be produced.

First, he has to show that he is a person who has the right to claim the privilege because of his relationship to the documents. Second, he has to show that the documents themselves are of such a nature that they come within the privilege.

For the following reasons, Petitioner submits that both he and the documents sought satisfy all of the requisite elements of the privilege.

Nature of Documents Sought

The subpoena in question seeks virtually all business records kept by petitioner in the course of his sole proprietor business, the Virginia Walsh Bonding Company, for certain years. These records are sought by a Federal Grand Jury sitting in the Eastern District of Missouri. Petitioner, through counsel, has been informed that the records are sought in connection with a criminal investigation of Petitioner.

The case of *Shapiro v. United States,* 335 U.S. 1 (1948), relied upon by the Government in the District Court (see Government Memorandum attached hereto as Exhibit H) involved a prosecution for violation of the Price Control Act of 1942. Shapiro, a produce wholesaler who was licensed under the wartime act, was required to produce records of purchases and sales of produce for the Price Control administrator's inspection pursuant to an admittedly valid regulation. The records were required to be kept pursuant to another federal regulation promulgated under the Act. Shapiro produced the records and was subsequently prosecuted by the Federal Government for violating the Act. He claimed immunity based on a section of the Act (§ 202(g)) which incorporated the Interstate Commerce Commission Act immunity provision, Title 49 United States Code, Section 46.

The Court held that the immunity provision did not apply to the records that Shapiro kept as required by the statute and that he produced, because the record keeping provisions were de-

signed to administer and *enforce* the statute. 355 U.S. at p. 8.

The Court noted that immunity statutes such as that contained in the Price Control Act and the I.C.C. Act pertained only to those records which are *not* required to be kept by statute or regulation. 335 U.S. at pp. 26-27. Thus, the Court created what has come to be called the "required records" doctrine. The doctrine essentially provides that the privilege against self-incrimination is not available as to records which are required to be kept by an individual or corporation when those records are *required by law* to be kept in order that there may be suitable information of transactions which are the appropriate subject of government regulation and enforcement of restrictions validly established. 335 U.S. at p. 33, *citing Davis v. United States*, 328 U.S. 582, 589-90 (1946).

This "required records" doctrine was interpreted by the Court in *Grosso v. United States*, 390 U.S. 62 (1968), as being comprised of three essential elements: 1) that the purpose of the United States' inquiry must be essentially regulatory; 2) information is to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept; 3) the records themselves must have assumed "public aspects" which render them at least analogous to public documents. 390 U.S. at pp. 67-69.

The records sought in the instant case lack so many characteristics from those sought in *Shapiro, supra*, as to clearly take them out of the "required records" exception to the privilege against self-incrimination. (Notably, the "required records" doctrine was held not to apply in *Grosso, supra*, a prosecution for failing to file gambling excise tax documents which contained inherently self-incriminatory evidence because the "regulatory" and "public aspects" requirements were lacking. Thus, the Court held, the required filing was an unconstitutional infringement on the privilege because the information sought did not come within the "required records" exception.)

A. The records sought have not been shown to be required to be kept by any statute or regulation.

The Government seeks to base its claim that the records sought are required to be kept by the Missouri Division of Insurance (Exhibit H hereto at p. 4 and note 7 therein).

A reading of the statutory section cited, Section 374.190, R.S.Mo., 1969, shows that no records are required to be kept under the statute cited by the Government. Further, the *Shapiro* and *Grosso* cases appear to mean that the keeping of the records sought must be required by Federal rather than State law in order for the Federal Government to acquire them.

B. This inquiry is not essentially regulatory.

The first *Grosso* requirement, that the request of the United States be essentially regulatory, is not met by the Government here.

The records sought, even if they were required to be kept by Petitioner by the Missouri Division of Insurance, certainly could not be inquired into by the United States in an effort to enforce the Missouri insurance laws, that duty being a function of the State of Missouri under our Federal system. Thus, the United States' inquiry is not essentially regulatory under *Grosso, supra*. To the contrary, it is abundantly clear that the action of the United States in subpoenaing these records for the inspection of a Federal Grand Jury is not for regulatory purposes, but solely for the purpose of securing evidence against petitioner in a criminal proceeding or investigation.

C. The records have not assumed a "public aspect".

It is petitioner's position that for records to have assumed a "public aspect" within the meaning of *Shapiro v. United States, supra*, they must be of such a nature as to bring them

within the public view. *See* examples cited by Frankfurter, J. dissenting in *Shapiro v. United States*, 335 U.S. 1, 59-62. No one other than petitioner has the right to view the records sought. Thus, the records sought are not of this public character and thus do not meet the "public aspect" requirement set forth in *Shapiro v. United States, supra*, and *Grosso v. United States, supra*.

Nature of the Business and Petitioner's Relationship With the Records

The government concedes that petitioner's business is a sole proprietorship and not a corporation or partnership. (Government Memorandum p. 7). Although this Court has recently held that the records of a partnership are not susceptible to a claim of privilege, *Bellis v. United States*, 417 U.S. 85 (1974), that case also noted that "the privilege [against self-incrimination] applies to the business records of a sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life." [Citations omitted.] 417 U.S. at pp.87-88. (Of course, corporate records are not susceptible to a claim of privilege, *Wilson v. United States*, 221 U.S. 361 (1911)).

Thus, petitioner submits that the records sought here are not an exception to the privilege against self-incrimination because they are sole proprietorship records, not those of a corporation or partnership.

The documents sought are in the possession of petitioner, not of a third party. Therefore, the records sought are distinguishable from those ordered produced in *Couch v. United States*, 409 U.S. 322 (1973). The *Couch* records were personal tax and financial records, but were in the possession of Couch's accountant and all of her records were at the accountant's office, a practice she had followed for fifteen years.

Additionally, *Fisher v. United States*, 425 U.S. 391 (1976) is not applicable to the records sought here. The *Fisher* records were the work papers of Fisher's accountant rather than Fisher's own papers. Thus, this Court held that Fisher could not claim the privilege because they were not his papers. This holding is based on the personal nature of the privilege.

For the foregoing reasons, petitioner submits that the documents sought by the subpoena are protected by his privilege against self-incrimination. Thus, the denial by respondent of his Motion to Quash the Subpoena was unlawful and in excess of respondent's legal jurisdiction in that it thereby forces petitioner to waive said privilege or be punished for contempt of court if he refused to waive said privilege.

CONCLUSION

For these reasons, petitioner prays that this Court issue its Writ of Prohibition prohibiting respondent from compelling petitioner to produce the records called for in the subpoena.

Respectfully submitted,

LONDON, GREENBERG
& FLEMING

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Attorneys for Petitioner

APPENDIX

EXHIBIT A

In the United States District Court for the
Eastern District of Missouri
Eastern Division

In Re:
Grand Jury Subpoena } No. 78 Misc. 16

ORDER

This matter is before the Court upon a motion filed by John Walsh to quash a subpoena duces tecum. After consideration of the matter,

It Is Hereby Ordered that the motion to quash be and is Denied; and

It Is Further Ordered that movant or any other duly authorized custodian of the records of Virginia Walsh Bond Company comply with the subpoena duces tecum on or before March 13, 1978.

Dated this 8th day of March, 1978.

/s/ H. Kenneth Wangelin
United States District Judge

EXHIBIT B

JUDGMENT

United States Court of Appeals
For the Eighth Circuit

No. 78-1209 September Term, 1977

John Walsh,
Petitioner,
v.
Honorable H. Kenneth Wangelin,
United States District Judge,
Respondent.

Petition for Writ of Prohibition

Petition for writ of prohibition in the above case having been considered by the Court it is now here ordered that the petition be, and it is hereby, denied.

March 23, 1978

EXHIBIT C

AO Form No. 110 (Rev. 5-68) Subpoena to Testify Before Grand Jury

United States District Court
for the
Eastern District of Missouri

To: Custodian of Records or Authorized Representative
Virginia Walsh Bond Company
3 North Central Avenue
Clayton, Missouri

You are hereby commanded to appear in the United States District Court for the Eastern District of Missouri at Room 427, U.S. Court & Custom House, 1114 Market Street in the city of St. Louis on the 2nd day of March 1978 at 9:00 o'clock A. M. to testify before the Grand Jury and bring with you[1] any and all account ledgers, account books, cancelled checks, or check stubs for the Virginia Walsh Bond Company, International Fidelity Insurance Company, or any of its subsidiaries, predecessors, or succesor corporations, partnerships, or business entities. for the years 1975 and 1976.

This subpoena is issued on application of the United States.

William D. Rund
Clerk

Date: February 21, 1978

By H. Eidson
Deputy Clerk

SBH/rh

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[1] Strike the words "and bring with you" unless the subpoena is to require the production of documents or tangible things, in which case the documents and things should be designated in the blank space provided for that purpose.

RETURN

Received this subpoena at ..... on .....
and on ..... at ..... I served
it on the within named ..... by
delivering a copy to ..... and tendering[2]
to ..... the fee for one day's attendance
and the mileage allowed by law.

.....

By .....

Date ....., 19.....

Service Fees

Travel ..... $

Services ....

EXHIBIT D

United States District Court for the
Eastern District of Missouri

In Re: Subpoena Duces Tecum Issued to Virginia Walsh Bonding Company	Misc. No. .....

Motion to Quash Subpoena Duces Tecum

Comes now John Walsh and moves the Court for an order Quashing the Subpoena Duces Tecum issued by the Clerk of this Court on February 21, 1978, directed to the Custodian of Records or Authorized Representative of Virginia Walsh Bonding Company and returnable before the Grand Jury at 9:00 a.m. on March 2, 1978, which subpoena is attached hereto as Exhibit 1. Said subpoena was served on John Walsh. On grounds for this motion your movant states:

1. Virginia Walsh Bonding Company is a proprietorship.

2. Additionally, upon information and belief, your movant submits that the Virginia Walsh Bonding Company is the focus and target of the investigation now being undertaken by the Grand Jury.

3. In view of the foregoing, your movant desires to, and does hereby, invoke his rights under the Fifth Amendment of the United States Constitution to decline to testify or to produce personal records before said Grand Jury upon the grounds that said testimony and records may tend to incriminate him.

4. The books and records demanded by said subpoena are personal books and records within the meaning of *Boyd v.*

United States, 116 U.S. 161 (1886) and *Bellis v. United States*, 417 U.S. 85 (1974) and are therefore subject to Fifth Amendment protections.

5. The compelled production of the aforesaid records, in accordance with the subpoena, would violate your movant's rights under the Fifth, Fourth and Fourteenth Amendments and the subpoena should, therefore, be quashed.

Respectfully submitted,

London, Greenberg & Fleming
By Lawrence J. Fleming
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100 North Broadway
St. Louis, Missouri 63102
(314) 231-8700

EXHIBIT E

United States District Court
Eastern District of Missouri
Eastern Division

In Re Grand Jury Subpoena Issued to Virginia Walsh Bonding Company } Misc. No. .....

Memorandum in Support of Motion to Quash Subpoena Duces Tecum Issued to Virginia Walsh Bonding Company

This memorandum is submitted in support of the position stated in movant's Motion to Quash that the forced production of certain documents required to be produced by the subpoena duces tecum will violate his privilege against self-incrimination guaranteed to him by the Fifth Amendment to the United States Constitution.

Background Facts

John Walsh, the movant, by his motion has alleged that Virginia Walsh Bonding Company is a proprietorship.

He is presently the focus of a Grand Jury inquiry initiated by the United States Attorney for the Eastern District of Missouri.

The records sought by the Grand Jury include substantially all of the records John Walsh could be expected to keep in the normal course of operation of the bonding company. The bulk of the records sought, however, appear to be business records kept by John Walsh in the course of his business such as account books, cancelled checks and check stubs. These records

are prepared by movant or at his direction, are kept in his own files and are presently in his sole possession and were in his sole possession when he was served with the subpoena in question.

Discussion

In the recent case of *Fisher v. United States*, — U.S. — 96 S. Ct. 1569 (1976), the United States Supreme Court reaffirmed the longstanding rule that a Grand Jury may not compel a person to produce books or papers in his possession that would incriminate him. This principle of Constitutional law dates back at least to the case of *Boyd v. United States*, 116 U.S. 116, 633-35 (1886). This protection against self-incrimination applies to the business records of a sole proprietor as well as to personal documents containing more intimate information about the individual's private life. *Bellis v. United States*, 417 U.S. 85, 87-88, 84 S.Ct. 2179, 218-83 (1974).

As *Boyd v. United States, supra* and its progeny make clear, the privilege against self-incrimination applies to production of documents via subpoena only if the documents in question are potentially self-incriminatory and are testimonial in nature. Thus, the subpoena in *Boyd* calling for production of fraudulent claims to be free from import duties, were suppressed because the Court found that the document, when coupled with its production in response to the subpoena amounted to testimony on the part of the defendants not only that the documents existed, but that the defendants were aware of their existence and contents.

Thus, the Court in *Fisher v. United States, supra*, noted that the Fifth Amendment proscription against compelled production of personal documents comes into play "only when the accused is compelled to make a testimonial communication that is incriminating." 96 S.Ct. at 1579. The Court noted that personal

documents are peculiarly testimonial in nature while noting that non-testimonial evidence such as blood samples, and handwriting exemplars does not fall within this Fifth Amendment protection and thus an accused may be compelled to produce such evidence. *See, e.g., Schmerber v. California*, 384 U.S. 787 (1966); *Warden v. Hayden*, 387 U.S. 294 (1967).

The testimonial nature of personal papers and documents was expressed in *Fisher, supra*, as follows:

> "The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes their possession and control by the taxpayer. It would also indicate the taxpayer's belief that the papers are those described in the subpoena." 96 S.Ct. at 1580.

Factually, *Fisher v. United States, supra*, is distinguishable from the present case. In *Fisher*, the documents sought were the work papers of an accountant employed by Fisher, rather than Fisher's own papers. Thus, the Court held that the papers were not protected by the Fifth Amendment privilege because they were not Fisher's papers, but rather were the accountant's.

Likewise, *Bellis v. United States*, 417 U.S. 85 (1974) is distinguishable from this case. In *Bellis*, the government sought production of records of a dissolved law partnership of which Bellis had been a partner. The Court held that Bellis could be compelled to produce the records because by their nature they were records of the organization, the partnership, a distinct legal entity under Pennsylvania law, not Bellis' individual records. Thus, the Court viewed Bellis as holding the records as a representative of the partnership with no more right to them than the rights of the other partners under state partnership law.

Bellis, supra, is distinguishable from the situation involved with the instant subpoena in that Mr. Walsh is a sole practitioner. He is not associated with other partnerships either in partnership or in a corporation. In language directly in point to the facts of this case, the *Bellis* court stated:

> "The privilege [against self-incrimination] applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life. [Citations omitted.] As the Court explained in United States v. White . . . [322 U.S. 694, 698], '[T]he constitutional privilege against self-incrimination . . . is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him . . .'" [Citations omitted.] 417 U.S. at 87-88.

Further, the decision in *Couch v. United States,* 409 U.S. 322, 34 L.Ed. 548 (1973) does not compel the production of the documents sought in the present case.

Couch, supra, held that in order for the privilege to obtain the taxpayer (or person under investigation) must not only own the records (*see, Fisher v. United States, supra*) but must have them in his or her possession. Thus, Ms. Couch's tax records, including records of sales, expenditures and payroll records were held to be not protected by her Fifth Amendment privilege. This was so because she had routinely turned over all her financial records to the accountant for a period of over fifteen years; he maintained them at his office, not at her place of business. *Compare: United States v. White,* 447 F.2d 757, *aff'd en banc,* 487 F.2d 1335 (5th Cir. 1973) with *United States v. Kasmir,* 499 F.2d 444 (5th Cir. 1974).

In conclusion, movant submits that the circumstances surrounding the existence of the papers at issue here bring them directly within the admittedly narrow protection of the Fifth Amendment as it relates to compelled production of personal documents. This is so because:

1) The documents are in Movant's possession. *Couch v. United States, supra;*

2) They are the records of a proprietorship. *Bellis v. United States, supra;* and

3) They were prepared by movant or at his direction and are not the property of anyone who may have prepared them at his direction, such as a secretary. *Fisher v. United States, supra.*

Conclusion

For the foregoing reasons, movant submits that the documents sought by the subpoenas in this case are protected by his Fifth Amendment right against self-incrimination and compelled production of said documents would violate that privilege. For that reason, movant submits that the subpoena in question should be quashed.

Respectfully submitted,

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(314) 231-8700

EXHIBIT F

In the United States District Court for the
Eastern District of Missouri
Eastern Division

In Re:
Grand Jury Subpoena } No. 78 Misc. 16

Order

This Court's Order of March 8, 1978, requiring compliance with the Grand Jury subpoena duces tecum on or before March 13, 1978, is hereby stayed for a period of 10 days from said date of March 13, 1978, and if during said period, proceedings for appellate relief are instituted by way of appeal or extraordinary remedy, then the stay shall continue until the termination of the proceedings in the Appellate Courts.

Dated this 10th day of March, 1978.

/s/ H. Kenneth Wangelin
United States District Judge

EXHIBIT G

In the United States Court of Appeals
For the Eighth Circuit

John Walsh,
Petitioner,
vs.
Honorable H. Kenneth Wangelin,
United States District Judge,
Respondent. } No. .....

Petition for Writ of Prohibition

Comes now John Walsh, pursuant to Section 1651, Title 28 United States Code and Rule 21 of the Federal Rules of Appellate Procedure, and for his Petition for Writ of Prohibition states as follows:

Facts

1) Petitioner is the sole proprietor of the Virginia Walsh Bonding Company and does business in the County of St. Louis, Missouri, within the Eastern District of Missouri.

2) Respondent Wangelin is a United States District Court Judge for the Eastern District of Missouri.

3) On or about February 21, 1978, petitioner was served with a subpoena duces tecum commanding the custodian of records of the Virginia Walsh Bonding Company to appear before a Federal Grand Jury to testify and to bring with him all the account ledgers, account books, cancelled checks and check stubs of the Virginia Walsh Bonding Company for the years

1975 and 1976 on March 2, 1978. Said subpoena was issued on application of the United States. A copy of the subpoena is attached hereto as Exhibit A.

4) On or about March 1, 1978, petitioner filed a Motion to Quash Subpoena Duces Tecum in the United States District Court for the Eastern District of Missouri wherein he alleged that he is the sole proprietor of the Virginia Walsh Bonding Company, that he invoked the Fifth Amendment privilege against self-incrimination as to his testimony and as to his personal records which were subpoenaed, that the subpoenaed records were personal records and thus within the privilege and that compelled production of said records would violate his rights under the Fifth, Fourth and Fourteenth Amendments to the United States Constitution. A copy of the motion and its accompanying memorandum in support thereof are attached hereto as Exhibits B and C respectively.

5) On or about March 8, 1978, said Motion to Quash was denied by respondent Wangelin and petitioner was ordered to comply with the subpoena on or before March 13, 1978. Said order was issued without allowing oral argument or stating the reasons therefor. A copy of the Court's order is attached hereto as Exhibit D.

6) That petitioner believes that he is the subject of a criminal investigation being conducted by the said Grand Jury concerning his conduct in doing business which business is writing bail bonds for persons accused of crimes. Counsel for petitioner has been informed that petitioner is a target of the Grand Jury.

Issue Presented

Did Respondent Judge act illegally and exceed his lawful jurisdiction in refusing to quash the subpoena duces tecum served on petitioner when said subpoena compels petitioner

to produce personal records and papers before the Grand Jury and thus forces him to involuntarily waive his privilege against self-incrimination guaranteed to him by the Fifth Amendment to the United States Constitution?

Relief Sought

Petitioner respectfully requests this Court to issue a preliminary writ of prohibition directing respondent to refrain from ordering petitioner to comply with the said subpoena and ordering him to withdraw his said order. Further, petitioner requests that this Court issue an order to respondent ordering him to show cause why the preliminary writ should not be made absolute, and that upon the hearing of this Petition that the Writ of Prohibition be made absolute.

Reasons Why the Writ Should Issue

In its memorandum in opposition to petitioner's Motion to Quash Subpoena Duces Tecum served upon him, the Government relies primarily on **Shapiro v. United States,** 335 U.S. 1 (1948), and **Grosso v. United States,** 390 U.S. 62 (1968. (See Government Memorandum, attached hereto as Exhibit E.) The District Court apparently agreed with the Government that these cases ruled the instant case in denying petitioner's Motion to Quash the instant subpoena. As previously noted, the District Court denied the motion without oral argument and without stating its reasons for its ruling. For the following reasons, petitioner submits the District Court was in error in denying his Motion to Quash and has exceeded its lawful jurisdiction by its ruling in that said ruling compels petitioner to waive his legitimate privilege against self-incrimnaton or be held in contempt of court.

Nature of Records Sought

The subpoena in question seeks virtually all business records kept by petitioner in the course of his sole proprietor business, the Virginia Walsh Bonding Company, for certain years. These records are sought by a Federal Grand Jury sitting in the Eastern District of Missouri. Petitioner can only surmise that these records are sought in connection with a criminal investigation against him by the Grand Jury.

The case of **Shapiro v. United States,** *supra*, relied upon by the Government, involved a prosecution for violation of the Price Control Act of 1942. Shapiro, a produce wholesaler who was licensed under the wartime act was required to produce records of purchases and sales of produce for the Price Control administrator's inspection pursuant to an admittedly valid regulation. The records were required to be kept pursuant to another federal regulation. Shapiro produced the records and was subsequently prosecuted by the Federal Government for violating the Act. He claimed immunity based on a section of the Act (§ 202(g)) which incorporated the Interstate Commerce Commission Act immunity provision, Title 49 United States Code, Section 46.

The Court held that the immunity provision did not apply to the records that Shapiro kept, pursuant to the statute, and produced because the records were designed to administer and **enforce** the statute, § 202(a), 335 U.S. at p. 8.

The Court noted that immunity statutes such as that contained in the Price Act and the I.C.C. Act pertained only to those records which are not required to be kept by statute or regulation. 335 U.S. at pp. 26-27. Thus the Court created what has come to be called the "required records" doctrine which essentially provides that the privilege against self-incrimination is not available as to records which are required to be

kept by an individual or corporation when those records are **required by law** to be kept in order that there may be suitable information of transactions which are the appropriate subject of government regulation and the enforcement of restrictions validly established. 335 US. at p. 33, **citing Davis v. United States,** 328 U.S. 582, 589-90 (1946).

This "required records" doctrine was interpreted by the Court in **Grosso v. United States,** 390 U.S. 62 (1968), as being comprised of three essential elements: 1) that the purpose of the United States' inquiry must be essentially regulatory; 2) information is to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept; 3) the records themselves must have assumed "public aspects" which render them at least analogous to public documents. 390 U.S. at pp. 67-69.

The records sought in the instant case lack so many characteristics from those sought in **Shapiro,** *supra*, as to clearly take them out of the "required records" exception to the privilege against self-incrimination. (Notably, the "required records" doctrine was held not to apply in **Grosso,** *supra*, a prosecution for failing to file gambling excise tax documents which contained inherently self-incriminatory evidence because the "regulatory" and "public aspects" requirements were lacking. Thus, the Court held, the required filing was an unconstitutional infringement on the privilege because the information sought did not come within the "required records" exception.)

A. The records sought have not been shown to be required to be kept by any statute or regulation.

The Government seeks to base its claim that the records sought are required to be kept by the Missouri Division of Insurance (Memorandum p. 4 and note 7 therein).

A reading of the statutory section cited, Section 374.190, R.S.Mo. 1969, shows that no records are required to be kept under the statute cited by the Government. Further, the **Shapiro** and **Grosso** cases appear to mean that the keeping of the records sought must be required by Federal rather than State law in order for the Federal Government to acquire them.

The records sought by the Government are clearly distinguishable from those in *Shapiro, supra,* in that the *Shapiro* records were required to be kept to "administer and enforce" the statute which Shapiro allegedly violated. Such records were clearly required to be kept by the Act itself and the regulations promulgated thereunder. Patently, the Federal Government is not trying to establish a violation of Missouri insurance law. That law itself does not require that persons such as petitioner keep the records sought by the Federal Government here. Thus, even if these are records which are customarily kept by persons in petitioner's business, there is no showing that he is required by either Federal or State law to keep them.

B. This inquiry is not essentially regulatory.

The first *Grosso* factor, that the request of the United States be essentially regulatory, is not met by the Government here.

1. The records sought, even if they were required to be kept by petitioner by the Missouri Division of Insurance, certainly could not be inquired into by the United States in an effort to enforce the Missouri insurance laws, that duty being a function of the State of Missouri under our Federal system. Thus, the United States' inquiry is not essentially regulatory under *Grosso, supra.*

2. The inquiry is not regulatory in nature. It is patently clear that the action of the United States in subpoenaing these records for the inspection of a Federal Grand Jury is not for regulatory purposes, but rather for the purpose of securing evidence against petitioner in a criminal proceeding or investigation.

C. The records have not obtained a "public aspect."

It is petitioner's position that for records to have attained a "public aspect" within the meaning of *Shapiro v. United States, supra,* they must be of such a nature as to bring them within the public view. *See* examples cited by Frankfurter, J. dissenting in *Shapiro v. United States,* 335 U.S. 1, 59-62.

The records sought are not of this public character and thus do not meet the "public aspect" requirement set forth in *Shapiro v. United States, supra,* and *Grosso v. United States, supra.*

Nature of the Business

The government concedes that petitioner's business is a sole proprietorship and not a corporation or partnership. (Memorandum p. 7). Although the Supreme Court has recently held that the records of a partnership are not susceptible to a claim of privilege, *Bellis v. United States,* 417 U.S. 85 (1974), that case also noted that "the privilege [against self-incrimination] applies to the business records of a sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life." [Citations omitted.] 417 U.S. at p. 87-88. (Of course, corporate records are not susceptible to a claim of privilege, *Wilson v. United States,* 221 U.S. 361 (1911)).

Thus, petitioner submits that the records sought here are not an exception to the privilege against self-incrimination because they are sole proprietorship records, not those of a corporation or partnership.

The documents sought are in the possession of petitioner, not of a third party. Therefore, the records sought are distinguishable from those ordered produced in *Couch v. United States,* 409 U.S. 322 (1973). The Couch records were personal tax and financial records, but were in the possession of Couch's

accountant and all of her records were at the accountant's office, a practice of fifteen years' duration.

Additionally, *Fisher v. United States*, 425 U.S. 391 (1976) is not applicable to the records sought here. The *Fisher* records were the work papers of Fisher's accountant rather than Fisher's own papers. Thus, the Court held that Fisher could not claim the privilege because they were not his papers. This holding is based on the personal nature of the privilege.

However, the records sought by the Government in this case are records that could reasonably be expected to have been prepared by petitioner or by someone at his direction and they are not the property of anyone who might have prepared them at his direction.

For the foregoing reasons, petitioner submits that the documents sought by the subpoena are protected by his privilege against self-incrimination. Thus, the denial by respondent of his Motion to Quash the Subpoena was unlawful and in excess of respondent's legal jurisdiction in that it thereby forces petitioner to waive said privilege or be punished for contempt of court if he refused to waive said privilege.

Wherefore, petitioner prays that this court issue its preliminary Writ of Prohibition prohibiting respondent from compelling petitioner to produce the records called for in the subpoena and that upon the hearing of this cause, make said Writ absolute.

Respectfully submitted,

LONDON, GREENBERG & FLEMING
By NORMAN S. LONDON
LAWRENCE J. FLEMING
Attorneys for Petitioner
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100 North Broadway
St. Louis, Missouri 63102
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Proof of Service

The undersigned certifies that a copy of this instrument was mailed to the Honorable H. Kenneth Wangelin and Mr. Stephen B. Higgins, Assistant United States Attorney, on the 21st day of March, 1978.

. . . . . .

THOMAS F. FLYNN

EXHIBIT H

United States District Court, Eastern District of Missouri

In Re
Grand Jury Subpoena } 78 Misc 16

Government's Memorandum of Law in Support of Its Response to Movant's Motion to Quash

In his Motion to Quash movant John Walsh contends that production of specified business records of the Virginia Walsh Bond Co. pursuant to a grand jury subpoena would be violative of his Fifth Amendment privilege against compelled self-incrimination. Such contentions, for the reasons stated in this Memorandum are without merit.

The doctrine that public or "quasi-public" records could not be withheld on the ground of possible self-incrimination was recognized as early as 1911, in *Wilson v. United States*, 221 U.S. 361 (1911). Although in *Wilson* the Supreme Court dealt specifically with records of a corporation, the rationale underlying the "quasi-public" records doctrine was thereafter established, i.e., that a corporation cannot resist production of its records to others upon grounds of self-incrimination because "it must submit its books and papers to duly constituted authority when demand is suitably made. This is involved in the reservation of the visitorial power of the State, and in the authority of the National Government where the corporate activities are in the domain subject to the powers of Congress." *Wilson* at 382.

The fundamental principle underlying this holding, then, was that "where, by virtue of the character and the rules of law applicable to them, the books and papers are held subject to

examination by the demanding authority, the custodian has no privilege to refuse production although their contents tend to incriminate them." *Wilson* at 382.

This exception to the privilege against self-incrimination was expanded to non-corporate entities in *Shapiro v. United States*, 335 U.S. 1 (1948), in which the Supreme Court held that production of an individual's personal records, if required to be kept by statute, could be compelled by subpoena.

As the Supreme Court stated in *Shapiro:*

> "The privilege which exists as to private papers cannot be maintained in relation to records required by law to be kept in order that there may be suitable information of transactions which are the applicable subjects of *governmental regulation* and the enforcement of restrictions validly established." *Shapiro* at 33. [Emphasis added]

See also, Davis v. United States, 328 U.S. 581, 589-90 (1946).

Years later, the Supreme Court refined this doctrine in *Grosso v. United States*, holding that the statute pertaining to records must be: (1) essentially regulatory; (2) apply to records that the regulated party customarily keeps; and (3) apply to records which have assumed "public aspects." *Grosso v. United States*, 390 U.S. 62, 67-68 (1968).

In the instant case, as will be shown below, the relevant state statutes meet the *Grosso* test and the operations of the Virginia Walsh Bond Co. come within the purview of these statutes, thus removing their records from the Fifth Amendment privilege against compelled self incrimination.

The facts show that the Virginia Walsh Bond Co. has been engaged in the bail and surety bond business since 1968.[1] Its

[1] The Virginia Walsh Bond Co., 3 N. Central Ave, Clayton, Mo., is engaged in the bond business and employs four persons, according to its application for a 1976 Business & Occupation License, Clayton, Mo. Additionally, as indicated in the June 1976, South-

employees, through whom it engages in the bail bond business,[2] are agents of a fidelity and surety insurance company[3] licensed by the division of Insurance to write surety bonds in Missouri.[4] It is through these surety bonds, executed by its employees, that the Virginia Walsh Bond Co. is able to engage in the bail bond surety business.[5] It is unquestioned then, that the Virginia Walsh Bond Co., through its employees, acts as an agent of an insurance company and is therefore under the jurisdiction of the Missouri Division of Insurance.[6]

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western Bell Yellow Pages (p. 197), the Virginia Walsh Bond Co., 3 N. Central, Clayton, Mo. offers city, county, state, federal, criminal and civil bail bonds. According to the City of St. Louis Earnings Tax return filed for 1972 and 1973, Virginia Walsh Bond Co., 3 N. Central, Clayton, Mo. has been engaged in the Surety Bond Bail business since 1968, at that time through the Summit Insurance Co., New York, N.Y., to which it paid substantial commissions.

[2] Investigative Files, Metropolitan St. Louis Police Department's Internal Affairs Division, show that numerous persons seeking release from custody would contact the Virginia Walsh Bond Co., as advertised in the Yellow Pages and would then be met by individuals identifying themselves as representatives of the Virginia Walsh Bond Co. (Michael Walsh or Francis Zimmerman). These individuals would then customarily pay a 10 per cent commission to the Virginia Walsh Bond Co., by check or by cash and would then be released on a surety bond executed by Virginia Walsh Bond Co. representatives on the International Fidelity Insurance Co., of Newark, N.J.

[3] International Fidelity Insurance Co., Newark, N.J., Bail Bond section, indicates that as of Feb. 4, 1975, four individuals (Francis Zimmerman,, Michael Walsh, Patrick Walsh and Kenneth Wolf) were engaged as agents of the firm, empowered to write bail bonds for the company.

[4] Missouri Division of Insurance, Jefferson City, Mo., indicates that International Fidelity Insurance Co., Newark, N.J. applied for a certificate of authority to engage in the surety bond insurance business in Missouri in 1975, 1976 and 1977.

[5] See n. 3 supra. Files of the Internal Affairs Division indicate that of bail bonds studied for a representative period, Virginia Walsh Bond Co. representatives invariably used the International Fidelity Insurance Co. as co-surety.

[6] Additionally, James Cunningham, Staff Counsel, Missouri Division of Insurance, states his opinion that a bail bond agency under-

Moreover, under pertinent Missouri statutes the Superintendent of the State's Division of Insurance has the power to examine the books and records of every agent of an insurance company.[7]

It is clear from an examination of this law and the facts as presented above, then, that the basic financial records of the Virginia Walsh Bond Co. are subject to the examination of the Missouri Division of Insurance and are thereby held in a representative capacity for its inspection, as noted in *Shapiro*, supra, and *Grosso*, supra. As such, then, the Virginia Walsh Bond Co. cannot claim a Fifth Amendment Privilege in these records and they must be produced pursuant to a lawfully issued subpoena.

Additionally, the trend of decisions suggests that the Fifth Amendment strictures against compelled production of certain books and records may be limited only to those records which are essentially private, rather than those which are of a business character.

In a line of decisions dating from 1886, the U.S. Supreme Court and the federal courts of appeals have recognized that the

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written by a corporate insurance company is engaged in the business of insurance subject to the jurisdiction of the Missouri Division of Insurance.

[7] 374.190. Examination of companies.

1. The superintendent shall examine and inquire into all violations of the insurance laws of the state, and examine the financial condition, affairs and management of any insurance company incorporated by or doing business in this state, and inquire into and investigate the business of insurance transacted in this state by any insurance agent, broker, agency or insurance company.

2. He or any of his duly appointed agents may compel the attendance before him, and may examine, under oath, the directors, officers, agents, employees, solicitors, attorneys or any other person, in reference to the condition, affairs, management of the business, or any matters relating thereto. He may administer oaths or affirmations, and shall have power to summon and compel the production of records, books, papers, contracts or other documents, if necessary.

Fourth Amendment protections against the unlawful search and seizure of *private* books and records and the Fifth Amendment strictures against compelled self-incrimination are closely intertwined.

Indeed, it is this relationship between one's right to privacy in personal records and one's right not to be compelled to incriminate himself through those records that the Court has relied upon in part in its decisions supporting the so-called required-records exception to the Fifth Amendment.

In *Shapiro*, supra, the Court looked to the "public aspects" requirement it set forth earlier in *Davis*, supra, which held that "even the dissenting justices in the Davis case conceded that there is an important difference in the constitutional protection afforded their possessor between papers exclusively private and documents having public aspects." If the records have "public aspects," then, compelling their production violates no privacy interests—and does not, thereby, violate Fifth Amendment strictures against compelled self-incrimination.

In *Shapiro*, supra, at 33, n. 42, the Court noted that in *Boyd*:

> "The opinion of the majority of the Court proceeded mainly upon a complex interpretation of the Fourth Amendment, taken as intertwined in its purpose and historical origins with the Fifth Amendment. Under that view, a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit [i.e., a suit for penalty or forfeiture] is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the constitution, . . ."

In effect, then, the Court said that the Fifth Amendment applies only to *private and personal* records and documents; those required to be kept by statute for examination by public authorities and those kept by one other than the party claiming the privilege, then are *not* private or personal and are therefore not within the protection of the Fifth Amendment.

The theory underlying the cases dealing with third party privilege (i.e., can accountants or attorneys be compelled to produce the personal records of their clients) is nearly identical, then, to the theory underlying the required records doctrine; the privilege against compelled self-incrimintaion is *personal* and cannot be claimed if the records are not private; i.e., are subject to examination by others (partners, the state, members of a corporation) or are in the possession of others (accountants or lawyers).

In *Fisher v. United States*, 425 U.S. 391 (1976), the Supreme Court held that accountant's documents in possession of an attorney were not privileged under the Fifth Amendment rights of the taxpayer himself because they were not "private papers." At 398.

In *Bellis*, supra, at 91-92, the Court noted that decisions holding the Fifth Amendment privilege "inapplicable to the records of a collective entity also reflect a second, though obviously interrelated, policy underlying the privilege, the protection of an individual's right to a private enclave where he may lead a private life. '. . . Protection of individual privacy was the major theme running through the Court's decision in *Boyd*, . . . But a substantial claim of privacy or confidentiality cannot often be maintained with respect to the financial records of an organized collective entity. Control of such records is generally strictly regulated by statute or by the rules and regulations of the organization, and access to the records is generally guaranteed to others in the organization. In such circumstances, the custodian of the organizations' records lacks the control over their content and location *and the right to keep them from the view of others which would be characteristic of a claim of privacy and confidentiality*." [Emphasis added].

If the organization's records are not private, then, the Court continues, they cannot be withheld under the privilege against compelled self-incrimination.

The exception to the privilege, the Court held in *Bellis*, supra, also applies to record of partnerships and for the same reasons: that the records are held in a representational capacity and are not personal or private.

One could argue by extension, then, that the theory underlying the Court's holdings as to corporations and partnerships (See, e.g., *Bellis*, supra) can fairly be extended to sole proprietorships operated as distinct business entities, separate from the personal affairs of their proprietors.

In the instant case, even though the Virginia Walsh Bond Co. is neither a corporation nor a partnership under Missouri law, it can be said that it operates as a business distinct from the personal affairs of its owners. It holds itself out as a bond company, with a business address distinct from that of its owners, is licensed as a business, and employs some four individuals in its operations. Since the rationale underlying the decisions in *Boyd*, supra, *Shapiro*, supra, and *Bellis*, supra, is based on the Fourth Amendment rights of privacy, it can be argued that the Virginia Walsh Bond Co., a distinctly separate business entity that employs others, cannot be private. As such, they evidence public aspects and must be produced pursuant to a lawfully issued subpoena.

Wherefore, for the foregoing reasons, the Government respectfully requests this Court to deny movant's motion to quash.

Respectfully submitted,

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STEPHEN B. HIGGINS
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